SUPREME COURT OF APPEALS OF VIRGINIA.

DIXIE PEANUT CO., Inc., *v.* LEWIS' ADM'X.

March 16, 1916.

[88 S. E. 72.]

1. Master and Servant (§ 265(3)*)—Injuries to Servant—Actions—Burden of Proof.—In an action for causing death of a servant, the burden is upon plaintiff to show that the accident was the result of defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 879, 897; Dec. Dig. § 265(3).*]

2. Master and Servant (§ 265(5)*)—Injuries to Servant—Actions—Presumptions.—The mere occurrence of an accident by which a servant is injured does not raise even a prima facie presumption that the master has been guilty of negligence or a breach of duty to his servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955; Dec. Dig. § 265(5).*]

3. Master and Servant (§ 278(1)*)—Injuries to Servant—Actions—Evidence.—In an action for causing death of a servant, the evidence must establish negligence of the master as an affirmative fact; a mere probability of negligence, consistent equally with the existence or nonexistence of negligence, not being sufficient.

[Ed. Note—For other cases, see Master and Servant, Cent. Dig. §§ 954, 957; Dec. Dig. § 278(1).*]

4. Master and Servant (§ 117*)—Injuries to Servant—Appliances.—An employee is not liable for death of an elevator operator caused by fall of the elevator from breaking of a cable, where the elevator was a first-class machine as good as any freight elevator on the market, and was in general use, and was regularly inspected by an expert three or four times a year and by an intelligent employee acquainted with the construction and operation of elevators two or three times a week, and there were competent employees to do the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 208; Dec. Dig. § 117.*]

5. Master and Servant (§ 265(8)*)—Injuries to Servant—Appliances—Knowledge of Master.—The happening of an accident to an employee because of a defect in the elevator he was operating does not render the master liable in the absence of a showing that the master knew of the defect, or in the exercise of ordinary care ought to have known of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955; Dec. Dig. § 265(8).*]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Master and Servant (§ 255(9)*)—Injuries to Servant—Actions —Instructions.—In an action for injuries to a servant, an instruction that, where a thing is shown to be under the management of defendant, and the accident was such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence in the absence of an explanation by the defendant that the accident arose from want of care, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 255(9).*]

Error to Hustings Court of Petersburg.

Action by the administratrix of Charles A. Lewis against the Dixie Peanut Company, Incorporated. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

George Bryan, of Richmond, for plaintiff in error.
Gilliam & Gilliam, of Petersburg, for defendant in error.

HARRISON, J. This action was brought by the administratrix of Charles A. Lewis against the Dixie Peanut Company, Incorporated, to recover damages for personal injuries, resulting in death, alleged to have been caused by the negligence of the defendant company. The trial resulted in a verdict and judgment in favor of the plaintiff, to which this writ of error was awarded.

There was a demurrer to the declaration, which we think was properly overruled. The record shows that the plaintiff's intestate was killed by the fall of a freight elevator that he was operating in the peanut factory of the defendant. The only witnesses of the accident were three colaborers of the deceased. These four men were at the time engaged in handling the raw peanuts as they were received in bags from the farmers on the first floor of the factory, and carrying them to the fifth floor, by means of the elevator, and there distributing them for shelling and other treatment. The load consisted of two trucks with five bags of peanuts on each. When this load was landed at the fifth floor and disposed of the elevator would return to the first floor for another load. It appears from the plaintiff's evidence that, at the time of the accident the deceased and another laborer with two empty trucks boarded the elevator to descend from the fifth floor to the first; that the deceased, who was operating the elevator at the time, pulled the rope for the downward trip, when the elevator gave a "bang," "gave a little buzz," and shot to the basement. The evidence of the witnesses for the plaintiff fails to show or to even suggest the cause

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the accident. Subsequent investigation showed that the cable, which was three-quarters of an inch thick, composed of five plies, and made of the best material used for cable purposes, had broken, but why it broke, or that the break was due to any negligent failure of duty on the part of the defendant, was not shown.

[1-3] The burden was upon the plaintiff to show that the accident was the result of the defendant's negligence. So far from sustaining that burden, the testimony of the plaintiff amounts to no more than proof that the accident happened, without any proof of ground for imposing upon the defendant liability therefor. The negligence of a master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a prima facie presumption that the master has been guilty of negligence or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant. The evidence in such case must show more than a mere probability of negligence, and it is not sufficient that it is consistent equally with the existence or nonexistence of negligence. There must be affirmative and preponderating proof of defendant's negligence. Moore Lime Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557; Va. Iron, Coal & Coke Co. *v.* Kiser, 105 Va. 695, 54 S. E. 889; Jacoby *v.* Williams, 110 Va. 55, 65 S. E. 491; N. & W. Ry. Co. *v.* Witt, 110 Va. 117, 65 S. E. 489.

[4] The uncontradicted evidence in the instant case shows that the elevator in question was a first-class machine, as good as any freight elevator on the market, and was in general use. It further shows that it was regularly inspected by an expert who had no connection with the defendant three or four times a year, to see that it was in good order, and that this expert examined it within a few weeks prior to the accident. It is further shown that an intelligent employee of the defendant, who was acquainted, from long experience, with the construction and operation of elevators, examined it two or three times a week to see that it was in good working condition. The result of these investigations was that up to the time of the accident no defect was discovered, but the elevator was found to be in good working order. The evidence further shows that, while the plaintiff's intestate was not at the time the regular operator of the elevator, he was an unusually intelligent man, with considerable experience in operating the same, which was a very simple matter, consisting of pulling one rope to go up and another to go down.

[5] It is clear from the evidence that the defendant furnished safe and suitable machinery for the work that was being done,

and competent employees to do such work, and that it had the machinery regularly inspected to see that it was in good order. It does not appear that the accident happened because of any defect in the elevator. If, however, it did so appear, there could be no recovery in this case, because the plaintiff has wholly failed to show that the defendant knew of such defect, or in the exercise of ordinary care ought to have known of its existence. Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976; Am. Locomotive Co. *v.* Chalkley, 113 Va. 485, 75 S. E. 90. So far as the plaintiff's evidence shows, the occurrence was a pure accident for which no liability rests upon the defendant.

[6] As the case must, under our practice, go back for a new trial, if the plaintiff be so advised, it is necessary to consider instruction 8 given by the court over the objection of the defendant. This instruction told the jury that:

"Where a thing is shown to be under the management of defendant, as was the case of the elevator and appliances in question, and the accident was such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from the want of care."

Under the facts of the case before us this was error. The plaintiff had failed to show that the defendant was guilty of any negligence, and the instruction, in effect, invoked and applied the doctrine of res ipsa loquitur; whereas this court has repeatedly held, as already seen, under similar circumstances, in cases between master and servant, that the mere occurrence of an accident does not raise even a prima facie presumption that the master has been guilty of negligence or of a breach of duty to his servant. Moore Lime Co. *v.* Johnston, supra, and other cases already cited.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted, to be had not in conflict with the views expressed in this opinion.

Reversed.

Editor's Note.—In some cases the fact of an accident and injury carries with it a presumption of negligence. A presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against the defendant, for there is prima facie a case of negligence. See Stokes *v.* Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Railroad Co. *v.* Pollard, 22 Wall. 341, 22 L. Ed. 877; Gleeson *v.* Virginia Midland Railroad, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458. For Virginia and West Virginia authorities on this question see the Michie Encyc. Dig. of Va. and W. Va., vol. 10, p. 403, et seq.

The Court of Appeals of Virginia in following the prior decision of that body that the mere occurrence of an accident by which

a servant is injured does not raise even a prima facie presumption that the master has been guilty of negligence or a breach of duty to his servant; that in an action for causing death of a servant, the burden is upon plaintiff to show that the accident was the result of defendant's negligence; and that in an action for causing death of a servant, the evidence must establish negligence of the master as an affirmative fact, a mere probability of negligence, consistent equally with the existence or nonexistence of negligence, not being sufficient; have taken the same view set forth by most of the supreme tribunals in this country. The law laid down by the federal courts is that the rule of "res ipsa loquitur," does not apply in those courts. Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 663. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & Pacific Railway *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Midland Valley R. Co. *v.* Fulgham, 181 Fed. 91, 94. See Illinois Cent. R. Co. *v.* Coughlin, 132 Fed. 801, 65 C. C. A. 101, Midland Valley R. R. Co. *v.* Fulgham, 181 Fed. 91, 104 C. C. A. 151, Patton *v.* Texas & Pac. R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Looney *v.* Metropolitan R. R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; American Car, etc., Co. *v.* Dietz, 203 Fed. 469, 471; Chicago & Northwestern Ry. Co. *v.* O'Brien, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; Northern Pacific Ry. Co. *v.* Dixon, 139 Fed. 737, 740, 71 C. C. A. 555, 558; Cryder *v.* Chicago, R. I. & Pac. Ry. Co., 81 C. C. A. 559, 561, 152 Fed. 417, 419. Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is inadmissible to the maintenance of a verdict sustaining it. Missouri, K. & T. Ry. Co. *v.* Foreman, 98 C. C. A. 281, 174 Fed. 377, 383; Kern *v.* Snider, 76 C. C. A. 201, 203, 145 Fed. 327, 329; Spencer *v.* Railway Co., 105 Wis. 311, 313, 81 N. W. 407; Thomas *v.* Railroad Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; Hyer *v.* Janesville, 101 Wis. 371, 376, 77 N. W. 729; Midland Valley R. Co. *v.* Fulgham, 181 Fed. 91, 95.

In American, etc., Co. *v.* Schachlewich, 229 Fed. 559, the court said: "The maxim of 'res ipsa loquitur' does not apply where the relationship of master and servant exists. Patton *v.* Texas & Pacific Railroad Company, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Looney *v.* Metropolitan Railroad, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; American Car & Foundry Company *v.* Dietz, 121 C. C. A. 593, 203 Fed. 469. In the opinion of the writer of this opinion, all that can be said in favor of this rule is that it has the sanction of

age, and the rule of stare decisis does not permit the courts to disregard it. The law-making department of the government alone can change the rule."

In Texas & Pacific Railway Company *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, a foreman in charge of a switch engine was injured by the explosion of another engine with which he had nothing to do. The supreme court approved of the charge of the trial court which embodied the rule "that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery."

In Brymer *v.* Railway Co., 90 Cal. 497, 27 Pac. 371, an instruction was asked which embodied a clause that "the mere fact that an accident occurred by which the plaintiff was injured does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged." Its refusal was held to be sufficient cause for a new trial.

In O'Connor *v.* Ry. Co., 83 Iowa 105, 48 N. W. 1002, the court said that "the mere happening of the derailment or the accident would not show negligence" and cited Baldwin *v.* Railway Co., 68 Iowa 37, 25 N. W. 918; Case *v.* Railway Co., 64 Iowa 762, 21 N. W. 30; Gandy *v.* Railway Co., 30 Iowa 420, 6 Am. Rep. 682.

In Brownfield *v.* Railway Co., 107 Iowa 254, 77 N. W. 1038, it was held that the rule res ipsa loquitur did not apply to a case where a locomotive fireman was injured by the derailment of an engine on which he was riding caused by a broken axle.

In Wormell *v.* Railroad Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321, the court said: "There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant."

In Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338, the court said: "The jury should not have been allowed to infer from the simple fact of the happening of the accident that there was negligence or unskillfulness on the part of the captain of the tug. * * * It is incumbent upon the plaintiff in this class of cases to establish by affirmative proof that the injury received by him was caused by the negligence or unskillful act of the fellow servant."

In Mining Co. *v.* Kitts, 42 Mich. 41, 3 N. W. 240, an employee was injured by the fall of a bridge, the cause of which was unexplained. The court held that, while it might be guessed or surmised that there was negligence somewhere, it did not extend beyond conjecture, and that, if a master was to be held liable under such circumstances, the rule that an employee assumes the ordinary risks of his employment would be wholly done away with.

In Bowen *v.* Ry. Co., 95 Mo. 268, 8 S. W. 230, the court said: "As between master and servant, the mere fact that an appliance proves to be defective, and the servant is injured, does not make out a prima facie case for the servant of negligence on the part of the master."

In Grant *v.* Railroad Co., 133 N. Y. 659, 31 N. E. 220, an employee of the railroad company was injured by a defective drawhead. The court said that it may have been broken on account of a latent defect beyond the reach of inspection, and added: "Whether it did or not we do not know, and there is no evidence upon the subject. No facts are shown from which the cause of the accident can be more than guessed at. There is food for speculation or wonder, but there is no evidence as to the cause."

In Huff *v.* Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep.

613, a steam boiler exploded, injuring an employee of the owner. and it was held that the mere happening of the accident was not evidence of negligence.

R. C. W.

JONES' ADM'R *v.* CITY OF RICHMOND.

March 16, 1916.

[88 S. E. 82.]

1. Municipal Corporations (§ 733 (2)*)—Liability for Tort—Street Repairing—"Governmental Function."—A city was liable for death of the motorman of a street car which, on account of the negligence of the driver of a wagon used in street grading work, collided with the wagon, since the work which its servant was engaged in doing was not of a governmental character exempting it from liability for his negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547, 1561; Dec. Dig. § 733 (2).*

For other definitions, see Words and Phrases, Second Series, Governmental Function.]

2. Death (§ 17*)—"Proximate Cause."—Where the collision of a street car with a city wagon, used in street grading work, resulted in injury to the motorman of the car, and such injury admitted the germs which produced the lockjaw which caused his death, his injury was the "proximate cause" of his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 19, 21; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

3. Trial (§ 233 (3)*)—Instruction—Reference to Pleading.—In an action against a city for personal injuries, an instruction telling the jury that if the driver of the city wagon was guilty of negligence in manner and form as alleged in the declaration or some count, etc., they should find for plaintiff, thus devolving upon them the task of determining from a long declaration containing several counts pertinent matter upon which to rest their verdict, was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529; Dec. Dig. § 233 (3).*]

4. Trial (§ 234 (2)*)—Instruction—Statement of Facts.—An instruction concluding with a direction to find for the plaintiff, but not containing a complete statement of all facts necessary to a recovery, is improper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. 234 (2).*]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.